

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 NANNETTE BASA, an individual,)
5 Plaintiff,) C21-00754-MLP
6 v.) SEATTLE, WASHINGTON
7 BRAND SHARED SERVICES, LLC, a)
8 Delaware corporation,) October 18, 2022 -
9 Defendant.) 1:00 p.m.
10) ORAL ARGUMENT via
11) Zoom Platform
12)

13
14 VERBATIM REPORT OF PROCEEDINGS
15 BEFORE THE HONORABLE MICHELLE L. PETERSON
16 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
17

18 APPEARANCES:

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1 THE CLERK: Good afternoon, Your Honor.

2 The United States District Court for the Western District of
3 Washington is now in session, the Honorable Michelle L. Peterson
4 presiding.

5 Your Honor, the matter before the Court this afternoon is
6 oral argument in Case 21-CV-754, assigned to Your Honor, Nannette
7 Basa versus Brand Shared Services, LLC.

8 Counsel, please make your appearances, beginning with
9 plaintiff.

10 MR. HIGGINS: Good afternoon, Your Honor. Alex Higgins
11 for the plaintiff, Nannette Basa.

12 MS. MCFARLAND: And good afternoon, Your Honor. Helen
13 McFarland here for the defendant, Brand.

14 THE COURT: Good afternoon, Mr. Higgins and
15 Ms. McFarland.

16 We, as I think Mr. Farrell just said, are here on two
17 motions. The first one is a motion to compel, which is found at
18 Docket No. 32, that was filed by the plaintiff in this case. I
19 have reviewed the motion, as well as the opposition at Docket
20 No. 37, the reply at Docket 44, and the supporting documents
21 filed with that.

22 We're also here on a motion for sanctions for spoliation.
23 That was also filed by the plaintiff at Docket No. 30. I have
24 reviewed that. I have also reviewed the opposition at Docket
25 No. 39 and the reply at Docket No. 46, as well as the supporting

1 documents filed in support or opposition of that motion.

2 All right. I think what makes sense, I'm going to start with
3 what I think is the easier of the two motions, and that's the
4 motion with respect to the privileged-document motion to compel.
5 I have reviewed, as I said, everything, and, frankly, I have
6 questions for defense counsel.

7 I don't have many questions for you, Mr. Higgins, but I will
8 give you -- I'm going to let Ms. McFarland respond to your reply
9 brief first, and then I, of course, will give you the last word.

10 Ms. McFarland, I have reviewed it. It seems to me that
11 Mr. Higgins at this point has somewhat conceded that you have
12 provided sufficient information with respect to that worksheet to
13 determine whether or not it is privileged. One thing that I
14 could not tell from the pleadings is whether or not this was a
15 document that was prepared for the attorney and then not shared
16 outside of that communication with the attorney. Is that what
17 you're representing to the Court?

18 MS. MCFARLAND: Yes, that's my understanding, is that
19 this was prepared for the attorney and for legal advice.

20 THE COURT: And not shared outside of that communication
21 with the attorney?

22 MS. MCFARLAND: Yes, that's right.

23 THE COURT: Okay.

24 Mr. Higgins, that appears to have been a document that was
25 created for communication with an attorney, it wasn't shared

1 outside the need-to-know group at the company, and it appears
2 that there's sufficient information to find that is, in fact,
3 privileged. But I did say I would give you the last word,
4 Mr. Higgins.

5 MR. HIGGINS: Yes.

6 I believe the testimony is -- and I'm looking for it
7 exactly -- that it was provided to share with -- Michelle Roman
8 created it, who's a senior vice president of HR, and she provided
9 it to share with her boss, Meg Newman, for her approval, and then
10 the document was also shared with the legal department. I'm not
11 finding that exact testimony right now.

12 But our position is that it has a dual purpose at least. It
13 has a business purpose, as indicated from the term "Corporate RIF
14 Worksheet." Not legal, not legal worksheet, not, you know,
15 lawyer, you know, attorney's eyes only, lawyer. And there's no
16 communications along with that work where she's saying, "Please
17 do a legal review" or anything like that, and no correspondence
18 back from the lawyer saying, "Here is my legal analysis." So
19 we're just very suspicious about the claim and that it was just
20 sort of routed through an attorney in order to claim privilege,
21 not that it was created solely for legal review.

22 I guess I would ask, since I'm having trouble finding the
23 citation, where is the citation that the defendant is relying on
24 that it was purely for legal purposes.

25 It seems from the deposition testimony of Michelle Roman that

1 she got approval from her boss -- gosh, I wish I could put my
2 finger on that, I apologize. I guess it's from her deposition
3 testimony, which we attached, where she says she got approval
4 from her boss regarding the layoffs, when submitting the names,
5 and then submitted it to legal. So it's a little vague, I grant
6 you that. I think the deposition testimony is a little vague.

7 But was there a declaration provided by Ms. Roman that it was
8 purely for legal purposes? I may have missed that.

9 MS. MCFARLAND: No, we did not provide a declaration
10 from Ms. Roman. But I will represent to you that it was
11 presented by Ms. Roman to legal counsel for advice on the layoff.
12 Ms. Roman no longer works for the company. If we need to get a
13 declaration from her, Your Honor, I mean, I suppose we could do
14 that, or we could -- I mean, the lawyer actually no longer works
15 for the company either. So it would be a little bit difficult to
16 try to do that. But I can represent to you that that was the
17 purpose of this communication.

18 THE COURT: And, frankly, the Court will take your
19 representations with respect to that.

20 I just have a clarification. Was it a document that
21 Michelle Newman -- is it Newman? No.

22 MS. MCFARLAND: Michelle Roman.

23 THE COURT: Roman. Michelle Roman created the document,
24 sent it to the attorney, the attorney gives advice, and then the
25 document is sent to Meg Newman for approval?

1 MS. MCFARLAND: No, no. She prepared a document to
2 speak with legal counsel and then used it to speak and
3 communicate with legal counsel.

4 THE COURT: Okay. But there was a discussion
5 about somehow Meg Newman came into this?

6 MS. MCFARLAND: Yes. At some point, Meg Newman, who was
7 the head of the human resources department, knew who was going to
8 be selected for layoff. So, you know, I don't know exactly what
9 Mr. Higgins is referencing. It sounds like he was talking about
10 a specific portion of Ms. Roman's deposition, but I don't believe
11 that that was -- she did not testify, as far as I recall, that
12 she shared that document with Meg Newman. She reported that she
13 eventually obtained approval for the layoffs in her department
14 from Meg Newman.

15 MR. HIGGINS: I think that's fair. But I think it
16 underscores the problem with not having an appropriate privilege
17 log as of September 7 when I took Michelle Roman's deposition. I
18 didn't know this document existed. I didn't know to ask her what
19 was the purpose of this document. "Did you ever share it with
20 anyone other than Ms. Newman?" So it's very easy to say now
21 that's what it is. But I don't think that counsel can represent
22 for Michelle Roman what she did, given the fact that she doesn't
23 have access to Ms. Roman as she's no longer -- she says she's no
24 longer with the company.

25 I think it would be appropriate for a very brief reopening of

1 Ms. Roman's deposition so we can find out those questions that we
2 should have been able to find out the first time we took her
3 deposition. We took about a 90-minute deposition, so it wasn't
4 like we were beating every horse in the room.

5 THE COURT: All right. I agree. I will order the
6 reopening of Michelle Roman's deposition for no longer than -- I
7 mean, 60 minutes should be plenty of time.

8 MR. HIGGINS: Yes, Your Honor.

9 MS. MCFARLAND: And --

10 MR. HIGGINS: More than enough, yeah.

11 THE COURT: Okay. As to the sole issue with respect to
12 the privilege surrounding the worksheet, and the reason that I do
13 agree with Mr. Higgins is this is a worksheet that appears to go
14 through the bases for identifying/selecting employees for
15 reduction in force, as well as why those employees were selected,
16 so I do think it's an important document, and because Mr. Higgins
17 says that he didn't have the privilege log at the time that he
18 was deposing Ms. Roman or sufficient information from the
19 privilege log, he was unable to ask questions about that.

20 Okay. Ms. McFarland, you wanted to interject?

21 MS. MCFARLAND: Thank you, Your Honor.

22 I just wanted to note that we have five more depositions
23 between now and next week, and I actually don't think we have
24 time. And I don't have -- I mean, I don't know for sure whether
25 Michelle Roman -- she doesn't work for the company anymore --

1 whether I will be able to squeeze her in in between now and, you
2 know, Friday of next week.

3 But we also do have Meg Newman's deposition coming up on the
4 27th. So if we could, Your Honor, I would ask that you revisit
5 that issue because rather than bring in a new person, we already
6 have Meg Roman {sic} to testify, and she can address whether she
7 saw this exhibit or not.

8 THE COURT: Yeah. But we want to know -- I mean,
9 Michelle Roman is the one that created the document and met with
10 counsel, and I think Mr. Higgins is entitled to explore whether
11 or not, you know, it was actually a privileged communication and
12 a privileged document. So I understand what you're saying.

13 I will, for the purposes of Ms. Roman's deposition only, I
14 will allow the deposition to be outside the close of discovery,
15 but it needs to be within like a week or ten days of the close of
16 discovery.

17 MS. MCFARLAND: Okay. I will do my best. I will reach
18 out to her and see if I can get her cooperation.

19 THE COURT: Okay. And if not, Mr. Higgins is going to
20 have to subpoena her, as I understand.

21 MS. MCFARLAND: Okay.

22 Your Honor, one other point -- and maybe this is a good time
23 to address it -- we were hoping, and I raised this issue with
24 Mr. Higgins before, but my associate, who is on this call, Emma
25 Kazaryan, has been involved in this case from the outset, and

1 she's actually due to have her first baby at the end of this
2 month, and so we were hoping to get a trial continuance so that
3 she could be available to try this case in the event that we're
4 not able to resolve it on summary judgment. Mr. Higgins said he
5 was not able to give me a response on whether they would
6 stipulate to that or not. But without moving the other
7 deadlines, we were hoping we could move the January 30th trial
8 date.

9 THE COURT: I would prefer you submit that in writing
10 and set forth a good cause for the trial continuance.

11 MS. MCFARLAND: Okay.

12 THE COURT: There hasn't been a trial continuance; is
13 that right?

14 MS. MCFARLAND: I think plaintiff requested one at one
15 point, which we stipulated to. So this would be the first
16 request from defense.

17 THE COURT: Okay. Well, confer with Mr. Higgins, and
18 hopefully you can work with Mr. Farrell on a new trial date, if
19 you submit the motion. And in your motion, obviously, you want
20 to propose a new trial date.

21 MS. MCFARLAND: Thank you.

22 THE COURT: Okay. So with respect to the motion to
23 compel, I will grant it to the extent that I am allowing
24 Mr. Higgins to further explore the circumstances surrounding the
25 RIF worksheet that Ms. Roman prepared by taking Ms. Roman's

1 deposition outside the close of discovery for no longer than
2 60 minutes. And I appreciate that Ms. McFarland will work with
3 Ms. Roman to schedule that, to the extent Ms. Roman is amenable
4 to that.

5 All right. Now, let's talk about Docket No. 30, which is the
6 motion for sanctions for spoliation of evidence. All right. I
7 have reviewed that, as I said, and I'm going to do the same
8 thing, Mr. Higgins. I'm going to start with Ms. McFarland,
9 because I have quite a bit more questions for her than I do for
10 you at this time, and then I will give you the last word.

11 Ms. McFarland, one thing that was noticeably absent from your
12 opposition was any discussion of the Teams messaging system, and
13 it seems that -- I believe it was Ms. Roman that testified that
14 she communicated frequently using the Teams messaging system.

15 MS. MCFARLAND: So we -- Your Honor, thank you. We have
16 produced the Teams -- we exhaustively searched the Teams
17 documents, and there weren't many because they're just --
18 Michelle Roman was not a supervisor and she wasn't really
19 involved with Ms. Basa until the layoff. So we did produce, you
20 know, all of the Teams messages that we were able to find, and
21 there were, you know, only maybe two, I believe. And so
22 that's -- that's -- and we have searched for all of those Teams
23 messages, and there really aren't any. So I apologize for not
24 addressing that more thoroughly in the briefing.

25 THE COURT: Okay. Is there any information in the

1 record? Does Mr. Higgins have information as to how that search
2 was conducted and what search terms were used?

3 MS. MCFARLAND: Mr. Higgins and Mr. -- and Mr. -- I'm
4 blanking on Cody's last name. Both plaintiff's counsel and our
5 side have been very extensively involved in search terms
6 throughout the course of this litigation. And, yes, I believe --
7 and I believe that either Emma or Cody could jump in on this --
8 we have been back and forth on lots of search terms, and I
9 believe all of those were approved by both sides and that all of
10 those searches were conducted.

11 THE COURT: And for clarification, did your litigation
12 hold letter discuss preserving Teams Messenger messages?

13 MS. MCFARLAND: Yes.

14 THE COURT: So the custodians would have been on notice
15 that they needed to preserve those?

16 MS. MCFARLAND: Yes.

17 And, Your Honor, we also have another deposition, I think,
18 scheduled to address this next week.

19 THE COURT: All right. So the next question that I
20 have -- and, Ms. McFarland, stop me if this is in the record, but
21 I didn't see it -- is after becoming aware of the potential
22 lawsuit in January of 2021 and prior to Mr. Broschinsky --

23 MS. MCFARLAND: That's correct.

24 THE COURT: -- Broschinsky's departure, what steps did
25 Brand take to preserve the information that he had with respect

1 to this lawsuit?

2 MS. MCFARLAND: So Mr. Broschinsky, we lost -- and I
3 admit this, and I think it is in our documentation. I mean,
4 Mr. Broschinsky left the company, and when he turned in his cell
5 phone, it was submitted to, I don't know exactly what -- some
6 third-party vendor that wipes it clean, and so we don't have his
7 text messages. You know, I think whatever they do with cell
8 phone messages -- whatever they do with cell phones when they
9 turn them back in, it's not something that the company keeps
10 anymore.

11 THE COURT: What I was asking -- I will get to that --
12 but I think let's take it in steps. The first step is what did
13 the company do to put Mr. Broschinsky on notice that he has to
14 preserve information related to this lawsuit?

15 MS. MCFARLAND: Well, we contacted him and informed him
16 about the litigation and spoke with him and asked him to
17 preserve.

18 THE COURT: When was that?

19 MS. MCFARLAND: So I don't know the exact date, but I
20 think it was shortly after the lawsuit was filed.

21 THE COURT: So not in January of 2021?

22 MS. MCFARLAND: I don't believe it was in January of
23 2021, but I can't confirm that.

24 THE COURT: All right. And remind me when the lawsuit
25 was filed.

1 MS. MCFARLAND: It was filed in July of 2021.

2 THE COURT: And he left in October.

3 And the notification to Mr. Broschinsky, the preservation
4 notification, you're saying it was verbal; it wasn't in writing?

5 MS. MCFARLAND: I don't have all of those details
6 because the in-house counsel for Brand is no longer with us. But
7 I believe it was verbal.

8 THE COURT: And have you made any attempts to confirm
9 whether or not or what he was told about preservation of
10 evidence?

11 MS. MCFARLAND: Yes. And we had spoken with him. So I
12 don't have -- I have not been able to speak with the prior
13 counsel, who's no longer with the company.

14 THE COURT: And then when Mr. Broschinsky left the
15 company, there was no effort made to obtain information from his
16 devices or his files that relate to this communication, or was
17 there an effort made to obtain information?

18 MS. MCFARLAND: Well, we have all of his e-mails, we
19 have all of his Teams messages. You know, those were all backed
20 up as a matter of course. The documents that are missing were
21 from his cell phone, the text messages, and he kept a hard copy
22 paper file in Georgia. It was his supervisor file.

23 I know that in the reply Mr. Higgins and plaintiff made
24 reference to a performance evaluation. There was no separate
25 performance evaluation that was not contained within Ms. Basa's

1 original personnel file.

2 THE COURT: How would you know that? How would you know
3 that if you don't have the paper file?

4 MS. MCFARLAND: Well, because he -- any personnel -- he
5 was her supervisor for one year, and he prepared and submitted a
6 performance evaluation, which is part of her file.

7 THE COURT: Okay.

8 MS. MCFARLAND: And we have produced that. That has
9 been produced.

10 So he testified that he kept some notes in a hard copy file
11 that was in Georgia. He left the company, and because of COVID,
12 you know, his file was somewhere in a storeroom or something in
13 Georgia, and we have been -- we've had exhaustive searches
14 looking for this file. It was a banker's box or something in
15 which he kept manager files, not just on Ms. Basa, but anyone
16 that he was supervising, and that whole box is missing.

17 THE COURT: I guess what I'm struggling with is you
18 receive the lawsuit, or in-house counsel receives the lawsuit.
19 Mr. Broschinsky is a potential witness in the lawsuit. This is
20 July of 2021. Mr. Broschinsky is still an employee of the
21 company. And at that time there's no effort to get the personnel
22 file that Mr. Broschinsky kept on Ms. Basa?

23 MS. MCFARLAND: We fell short there on getting it.

24 THE COURT: Okay. And as far as you know, was there any
25 discussion or attempt to get the text messages from his cell

1 phone that was wiped?

2 MS. MCFARLAND: Not before it was wiped.

3 THE COURT: Well, it would have to be before, unless
4 they didn't do a very good job of wiping it.

5 MS. MCFARLAND: So, no. No.

6 THE COURT: All right. And you can tell me -- I don't
7 think this is privileged -- but were you involved in the
8 litigation hold or your firm involved, or is this something that
9 was handled completely in-house?

10 MS. MCFARLAND: It was completely in-house.

11 THE COURT: Okay. And then when did your law firm --
12 has your law firm been involved in the preservation or notifying
13 employees of their preservation obligations?

14 MS. MCFARLAND: Yes.

15 THE COURT: Okay. When did your -- and I think it's in
16 there -- but when did your preservation letter go out?

17 MS. MCFARLAND: I don't have -- I don't have it in front
18 of me. But shortly after we -- shortly after we represented --
19 you know, appeared or took on representation of this case, which
20 was after --

21 THE COURT: Okay. So sometime you think maybe in August
22 of 2021?

23 MS. MCFARLAND: Yes. Yes.

24 THE COURT: And so would your letter, your preservation
25 letter, have gone to Mr. Broschinsky? It should have, right?

1 MS. MCFARLAND: I think so. Yes, it should have.

2 THE COURT: What I'm struggling with, Ms. McFarland, is
3 we're here on a motion to sanction your client for spoliation of
4 evidence, and you don't have a good grasp of the facts that
5 surround the allegations contained in the motion. And so I don't
6 want to unduly prejudice you. I mean, you should have prepared,
7 frankly. But I have concerns about how the preservation process
8 happened in this case and why, you know, from January of 2021
9 until after Mr. Broschinsky leaves in October of 2021, nobody
10 reached out to him and collected information relating to
11 Ms. Basa, who has, like, clearly filed a lawsuit against the
12 company. And so, you know, there's merit to Mr. Higgins' motion
13 in this regard with respect to, you know, whether or not there's
14 been spoliation of evidence. I'm not satisfied with your answers
15 to my questions with respect to why these simple tasks were not
16 undertaken to collect relevant information. But I'm going to
17 hear from Mr. Higgins.

18 And I believe that all the other text messages have been
19 resolved and we're really just dealing with Mr. Broschinsky, is
20 that right, Ms. McFarland, as far as you know?

21 MS. MCFARLAND: As far as I know, there were no other --
22 I know that Karen Riapos and Michelle Roman don't have any text
23 messages with plaintiff.

24 THE COURT: Or about plaintiff?

25 MS. MCFARLAND: Or about plaintiff, correct.

1 THE COURT: All right. Mr. Higgins, I will give you an
2 opportunity to present your positions.

3 MR. HIGGINS: Well, I don't agree that it's been
4 resolved, that nobody else had any text messages about the
5 plaintiff. In fact, I find that hard to believe, that Karen
6 Riapos never texted anybody about plaintiff during the year she
7 was her manager. And I think what happened is the same thing
8 what happened to Mr. Broschinsky's phone. Nobody ever texted
9 him -- nobody ever searched it, and that was the troubling thing.

10 We know that Nannette fastidiously preserved her text
11 messages because we told her to, whether they were good or bad.
12 And when we turned them over, she had some text messages with Rod
13 Broschinsky. We weren't getting those from the defendant. We
14 kept asking, "Where are the test messages that are responsive?"
15 "We have given you everything" was the answer; there's nothing
16 more. We knew there was a problem with that, so we kept asking
17 about it.

18 We asked Karen Riapos, "Did anybody look at your phone? Did
19 you search your phone?" She says, "No." I asked her three or
20 four different ways. "Did you give your phone to somebody to
21 search?" "No." "So you never searched your phone for anything
22 to do with Nannette Basa?" "No, I didn't." I mean, her answers
23 were crystal clear in that deposition.

24 And from that day forward, we have been asking Brand, from
25 June 3rd, where are these text messages that probably exist that

1 are responsive to the discovery in this case: your layoff
2 process, your layoff selection, the plaintiff's performance
3 issues that you claim were one of the reasons for her layoff.
4 Absolutely nothing. And we think the reason is, nobody ever
5 searched for them and they were lost. And we have evidence of
6 that from Rod Broschinsky and we have evidence of that from the
7 Teams messages and we have evidence of that from the supervisory
8 file that wasn't maintained. I think "Where there's smoke,
9 there's fire" is a very apt analogy here. So we don't agree that
10 everything else is fine. We think there are a lot of missing
11 text messages.

12 Now, on the Microsoft Teams issue, they don't respond to it
13 directly, but there's an indirect admission in Ms. Riapos's new
14 declaration, where she says: I didn't have text messages because
15 I really didn't use text messages that much; I used Microsoft
16 Teams and e-mails. Okay. Well, where are your Teams messages?
17 We don't have anything from her. We have a couple from Michelle
18 Roman, but that's it, two.

19 Ms. Riapos put in e-mails things that are helpful to
20 plaintiff's case. We attached as Exhibit 13 to my declaration
21 communications about the plaintiff with her boss, Meg Newman.
22 Meg Newman wants to know: What's the future for the plaintiff?
23 She is asking me, and I really don't know Ms. Basa very well.
24 This is two months before the layoff. It goes to Karen Riapos
25 who e-mails back and says: Well, I have these plans for her to

1 do this, that, and the other thing; I have these ideas for her.
2 Not a whisper about performance issues. That is very telling
3 evidence that we need to use at trial to show that these
4 performance issues were made up after the fact. That's not the
5 reason at all she was selected for layoff. And I think we would
6 find a lot more if we had the text messages, if we had the Teams
7 messages, but they were just not preserved.

8 So the answer to the question, I think Ms. McFarland was
9 truthfully telling you that they have been searching. I don't
10 doubt that at all. The problem is they didn't preserve them,
11 they didn't assure preservation -- somebody didn't, Brand -- and
12 so when they did get around to searching for them, they were
13 gone.

14 So what has not been communicated to the Court is when did
15 they preserve these things and who did they tell to preserve and
16 how did they tell them to preserve. That's completely gone.

17 And Ms. Riapos's claim in her declaration that, "Oh, I now
18 remember I did search my phone." She conveniently leaves out
19 when. Was it two days before her deposition? Was it two days
20 after? That's June of 2022. That's a year and a half after you
21 get notice of dispute.

22 So there are many, many, many questions raised by this
23 spoliation that go far and wide in this case with regard to Rod
24 Broschinsky's supervisory file and on.

25 Now, I want to mention that supervisory file because I think

1 there's a misunderstanding here. Mr. Broschinsky has a
2 performance appraisal that he drafted that I don't think was ever
3 submitted into the system, and it's because he was no longer her
4 manager; it didn't really matter to him. He was only her manager
5 for, I think, until August -- I can't remember the year -- but it
6 was a partial year, and then Karen Riapos comes in and takes
7 over. And so she wanted him to do the review, but it just fell
8 through the cracks. We think that's the review from 2019 that's
9 in that supervisory file. So that appraisal has never been
10 produced. And that's the point we were trying to make --

11 THE COURT: Oh, I see.

12 MR. HIGGINS: -- in our briefing.

13 I have a couple other notes from some of the comments.

14 The litigation hold letter about Teams messages, I don't know
15 if that's true or not. I mean, it may have been. But, again, if
16 it was done in August or September of 2021, that would be long
17 after people might have deleted those things. I mean, I don't
18 know much about how things are stored. We have a 30(b)(6)
19 deposition next week. Maybe I will become better educated, but
20 I'm afraid I'm going to get tech speak and it's going to go over
21 my head, but I'll try.

22 All right. I think these verbal notices of hold are frankly
23 just -- I have never heard of them before, but I don't think they
24 should be given a lot of weight, especially since the person who
25 gave them may no longer be with the company, as I understand it,

1 and has not submitted a declaration.

2 When Mr. Broschinsky left, there was no effort to obtain his
3 files.

4 I talked about the performance appraisal. I apologize.

5 Oh, the text messages that were wiped. We believe others as
6 well.

7 I think I covered what I wanted to cover from what was stated
8 by Ms. McFarland, but I'm happy to answer other questions the
9 Court may have about this issue.

10 THE COURT: Well, let me ask you this. I mean, it seems
11 that we have some evidentiary issues that need to be resolved.
12 Frankly, I was surprised that they weren't included as part of
13 the opposition to your motion for sanctions. And, you know,
14 there should have been a declaration in there that says here were
15 all the steps that were taken to preserve the information, the
16 supervisory file, the text messages; here were the steps that
17 were taken to search the existing employees' text messages or
18 cell phones or, you know -- I guess they're all existing
19 employees. I can't recall. No. Ms. Roman is not. In any
20 event, there's, like, no declaration as to here were the steps
21 that we took to preserve evidence so this spoliation motion
22 should be denied. And so, you know, I'm struggling with do I
23 give Brand another opportunity to come forth with evidence or,
24 you know, something that the Court can use to find that they, you
25 know, met their obligations to preserve evidence, or do I rule on

1 the record that's before me. And that's what I'm struggling with
2 right now.

3 But, Ms. McFarland, I'm going to give you the last word on
4 this before I make my decision. Go ahead.

5 MS. MCFARLAND: Thank you, Your Honor.

6 And I just -- you know, I feel like I didn't really get a
7 chance to make our argument on this.

8 THE COURT: Okay. Go ahead.

9 MS. MCFARLAND: Yeah. I know that I was answering some
10 questions that were pretty pointed.

11 But I do feel like Karen Riapos did clear -- I mean, I think
12 it's very clear that she says she didn't communicate by text
13 message. She submitted a declaration that said that. I think
14 it's notable that Nannette Basa did not have a single text
15 message with Karen Riapos or Michelle Roman or these other people
16 that they're identifying. If there were text messages, you would
17 think that she would have mentioned that "I know I texted them."
18 She didn't submit a declaration saying there were text messages.
19 So I feel like the record is clear that what we're talking about
20 is Mr. Broschinsky's text messages, and those documents have been
21 produced by plaintiff.

22 THE COURT: I'm going to stop you there because I think
23 you are missing the point or the evidentiary issues that I'm
24 having, and that's with respect to the preservation. Not the
25 issue of whether or not they actually have text messages, but

1 what steps were taken by the company to look to see if they have
2 any of these text messages, like, you know, taking their phone
3 and doing the search or something along those lines.

4 So before we get off the topic of text messages, if you could
5 just address that.

6 MS. MCFARLAND: Sure. And I apologize if I -- I did
7 want to make that point because I think it's important.

8 With regard to preservation issues, like I said, I think that
9 we had some errors in our -- you know, in the process, and I
10 admit that and we acknowledge that. But I want to get back to,
11 again, what the rule is, FRCP 37(e), which clearly says that if
12 documents are missing and they cannot be restored or replaced
13 through additional discovery, the Court still needs to find
14 prejudice to the other side from the loss of that information.
15 And the missing documents with regard to Mr. Broschinsky were
16 with a supervisor that supervised her over a year before she was
17 laid off, and he wasn't even involved in the decision to lay her
18 off. So I do feel -- and I admit that we've made some mistakes,
19 and there's mistakes for sure, and there's nothing I can do about
20 that. I wish that was not the case. But I still think that
21 there was no prejudice to Ms. Basa as a result of that because he
22 was not involved in the decision to terminate her. So even --
23 you know, nor was his, perhaps, a draft of his performance
24 evaluation of her. That was not a consideration in the factors
25 about why she was selected to be laid off.

1 THE COURT: Can I ask you a question then? You know, as
2 I understand it, one of the bases for selecting her for the
3 reduction in force was because she was having performance issues,
4 and if, in 2019, with Mr. Broschinsky, if he has a performance
5 review of her that's glowing, that does seem to be relevant as to
6 whether or not the company's bases for selecting her is
7 pretextual.

8 MS. MCFARLAND: True.

9 So Ms. Riapos and Ms. Roman testified that the reason she was
10 selected was primarily because we have a layoff. This is the
11 fourth quarter of 2020. You know, everything was falling apart,
12 and because of COVID, all of their facilities were shut down.
13 There were serious financial issues. They made the decision to
14 lay off over 100 people around this same time period because of
15 the reorganization that was necessary as a result of COVID and
16 the downturn in the economy. So that was the primary reason she
17 was laid off.

18 The secondary reason was that the job that she was working
19 on, which was organizing temporary labor, was no longer going to
20 be necessary. That's undisputed. That was her reason.

21 Ms. Karen Riapos testified then also, as another factor --
22 and this was sort of thrown in, but it was true -- she had heard
23 that Ms. Basa was -- you know, there were complaints. She had
24 received complaints about Ms. Basa's recruiting. And
25 that's evidenced in documents that we have produced. She

1 testified about it. Mr. Higgins is taking the depositions of
2 every single person who was mentioned as having complaints about
3 Ms. Basa and her performance. Those performance issues were
4 related to her attitude, her lack of responsiveness, you know.
5 And this was in Ms. Riapos's decision-making. She was not
6 relying upon what Ms. Basa did with Rod Broschinsky over a year
7 before this. This is her own personal experience and what she
8 had received as commentary from people about Ms. Basa's
9 performance.

10 So it's not overall general performance. Her performance
11 evaluations are not bad. I mean, there's nothing in them that
12 says she was underperforming or that that was the reason she was
13 laid off. It was one of the things that Karen mentioned as
14 another factor in why she thought it was a good decision to
15 select Ms. Basa for this layoff.

16 So I do, again, think that Mr. Broschinsky's file, while,
17 admittedly, should have been preserved and we should have it,
18 it's still not prejudicial to plaintiff as far as any of the
19 issues in this case.

20 THE COURT: All right. I didn't want to -- were you
21 done with your presentation?

22 MS. MCFARLAND: Yes, Your Honor. I mean, I think
23 that's it. I mean, Ms. Basa, even in her motion, in the moving
24 papers, on page 8, she says she doesn't have prejudice. She
25 said, "Because the electronic communications sought here no

1 longer exist, the extent of prejudice to plaintiff is difficult
2 to know." So she's assuming that there might be some documents
3 in the text messages or in the file that would be helpful to her,
4 and she's assuming there's prejudice, but she doesn't have any
5 prejudice because he really wasn't related -- you know, he wasn't
6 involved in this decision.

7 THE COURT: Okay.

8 MS. MCFARLAND: It would be another matter altogether if
9 he had said -- you know, if he had weighed in on this decision,
10 if Mr. Broschinsky said, "I think that Nannette Basa should be
11 terminated or laid off because of her performance issues for me."
12 You know, that's a whole different kettle of fish. That's, you
13 know, very clearly relevant, his opinion of her and his notes,
14 his contemporaneous notes that he might have taken about his
15 evaluation of her. But a year before she's selected, you know,
16 by people who are not him, it's a different -- you know, it's not
17 really relevant. And so I'd submit that while it's regrettable,
18 it would not -- it's not relevant and it's not prejudicial to
19 plaintiff.

20 THE COURT: Would it -- I mean, Mr. Broschinsky's files,
21 I think that's a done deal, unless somebody finds the file in
22 Georgia, but it sounds like the text messages are not going to be
23 found.

24 With respect to the Teams messages and the text messages,
25 would it be too difficult to have somebody submit a declaration

1 that says when and how they conducted the search for the text
2 messages on cell phones?

3 MS. MCFARLAND: I don't think so. We could do a
4 declaration.

5 THE COURT: Mr. Higgins, I mean, Ms. McFarland does
6 raise a good point about prejudice and, you know, how do I find
7 prejudice. I really don't have anything in the record other
8 than, you know, there might be something there.

9 MR. HIGGINS: Well, you have Mr. Broschinsky's own
10 testimony that the performance evaluation was good and now we
11 don't have it. So we don't know how good it was. I can't quote
12 from it. I can't enlarge it and show it to the jury and say,
13 "How can this person who was doing this now be this?" I also
14 can't argue that these performance issues, like the one that
15 supposedly was raised by Rod Broschinsky to Karen Riapos about
16 strained communications with plaintiff, I can't now prove that
17 they were insignificant because they didn't even take notes and
18 put them in the file. Because he says, "Oh, I may have taken
19 notes. I'm a pretty good note-taker." But they don't have the
20 file. So now the jury goes "Okay." Now I can't show he didn't
21 take notes.

22 The same with all the text messages and the Teams messages
23 that may be similar to the e-mails that I have that are helpful
24 to the case. The e-mails that I have that are similar are the
25 conversations where Karen Riapos talks about the future plans for

1 Nannette Basa, that she wasn't really a bad employee, she didn't
2 have all these performance issues, that she was planning to do
3 this with her or that with her. Just the kind of normal
4 communications about plaintiff that probably existed. I think
5 it's easy to find, based on the review of the e-mails, that
6 similar Teams messages/text messages probably existed.

7 So it doesn't, of course -- and that's the quote from the
8 brief, is that the "extent of the prejudice" cannot be known. I
9 said that. I stand by that. That doesn't mean that there is no
10 prejudice. That just means it's hard to quantify.

11 And so, you know, the remedy is typically to say to the jury:
12 You may find that the information would have been helpful to the
13 plaintiff. You don't have to. It's not a mandatory. And they
14 can argue, no, there's nothing in there that would have been
15 helpful. And it doesn't seem to me to be an onerous instruction
16 such as a mandatory "You must find" that it would have been
17 helpful to the plaintiff, or, even worse, striking defenses, like
18 you can't argue performance issues because you haven't given all
19 the information that might be -- that might undermine the
20 performance concerns.

21 THE COURT: When we're talking about those sanctions,
22 don't I have to find that there was culpability, like there was
23 an intent on the part of Brand?

24 MR. HIGGINS: Well, I have two answers to that. One is,
25 not according to Judges Coughenour, Robart, and Lasnik, all of

1 whom have written opinions after the adoption of 37(e), and they
2 don't say anything about that.

3 Judge Coughenour, in *Musse*, in 2021, says, "A litigant has a
4 culpable state of mind for spoliation purposes if the evidence
5 was destroyed knowingly, even without intent to breach a duty to
6 preserve it, or negligently." I mean, it's stated about as
7 squarely as you can.

8 The second answer to that is, I found this morning -- I was
9 thinking about that question and sort of anticipating it, and so
10 I did some research this morning and found that there are lots of
11 good cases that say that you can find intent from circumstantial
12 evidence. You don't have to, you know, show some sort of: We
13 wanted to get rid of these documents because they knew they were
14 helpful to the plaintiff. And, you know, if the Court wants to
15 get into that, I would suggest looking at a recent case from the
16 District of Arizona called *Fast v. GoDaddy*, and it's 340 F.R.D.
17 326. At page 339, there's a collection of cases.

18 Did I go too fast?

19 THE COURT: No. I got it.

20 MR. HIGGINS: Okay.

21 There's a collection of cases there about how circumstantial
22 evidence may be accorded equal weight with direct evidence, and
23 if you put enough together -- I mean, basically, what I don't
24 understand is if a litigant decides I'm not going to really do
25 anything to preserve evidence, isn't that intentional? Isn't

1 that --

2 THE COURT: Yeah. You know, I was just -- you know,
3 *Apple v. Samsung*, I know it's not out of this jurisdiction, but I
4 thought the Court there had a good way of looking at it and
5 referring to it as "conscious disregard." So conscious disregard
6 of your discovery obligations or preservation obligations could
7 be found by failing to do as little as issue a litigation hold
8 notice to any employees -- in that case, it was for eight months
9 after its preservation duty arose -- and further delaying
10 issuance of a litigation hold notice to several key custodians.
11 And that act justified, although negligent, but was in conscious
12 disregard to the duty to preserve.

13 It's sort of the situation that we have here. But I don't
14 want to make that finding based on the record that I have before
15 me. And one question, Mr. Higgins. You said that you have a
16 deposition coming up. Is it a 30(b)(6) deposition on this issue?

17 MR. HIGGINS: Yes, Your Honor.

18 THE COURT: Okay.

19 And Ms. McFarland has already indicated that she can get
20 declarations from declarants stating when the cell phones were
21 searched for text messages, how they were searched, when the
22 Microsoft Teams -- I don't know if it's an account, that you
23 search by account or across the entire company -- but when they
24 were searched, how they were searched.

25 So how much time, Ms. McFarland, do you need to submit those

1 declarations?

2 MS. MCFARLAND: Can I get two weeks?

3 THE COURT: I think that's fine.

4 And then, Mr. Higgins, when is your 30(b)(6) deposition on
5 this topic?

6 MR. HIGGINS: It's split up over a couple of days. So I
7 don't remember. It's either the 26 or the 27th.

8 THE COURT: Okay. So well within the two-week period?

9 MR. HIGGINS: Right.

10 THE COURT: I --

11 MR. HIGGINS: Go ahead.

12 THE COURT: Let me try what I'm going to order and then,
13 Mr. Higgins, I will give you an opportunity to respond as well as
14 Ms. McFarland.

15 Two weeks from today, which would be -- I'll get the calendar
16 out -- is that the 1st? By November 1st, I would like each side
17 to submit a supplemental brief attaching any declarations or
18 evidence/transcripts in response to the motion for sanctions for
19 spoliation. And that the briefs should be no more than seven
20 pages each. And then after submitting the supplemental
21 information, I will rule on the underlying motion for sanctions
22 for spoliation.

23 MR. HIGGINS: Your Honor, the only -- I want to make two
24 points. One is that this has been exceedingly frustrating and
25 time consuming for a couple of solo practitioners who have been

1 trying to get text messages and explanations, basic explanations,
2 like the ones you are ordering now, about where are the text
3 messages, where is the information we expected to find that we're
4 not finding, and to be told at the eleventh hour that Karen
5 Riapos suddenly remembers that she searched her phone and things
6 like this. It's just -- you know, it's incredibly frustrating,
7 and that's really not a legal argument.

8 And then, secondly, I would say I don't know how quickly
9 court reporters can get transcripts turned around, but would you
10 be all right with giving us until the end of the day,
11 November 2nd, to get -- just an extra day might help with getting
12 transcripts from the court reporters.

13 THE COURT: Yes, I am comfortable giving you until the
14 end of the day. Or just file it by November 2nd, which gives
15 you, I think, until 11:59 p.m.

16 MR. HIGGINS: Right.

17 THE COURT: Okay. I understand your frustration,
18 Mr. Higgins, and I do believe part of your motion for sanctions
19 was for attorney's fees as well; is that right?

20 MR. HIGGINS: Yes.

21 THE COURT: Okay. That's something that the Court will
22 address once I receive the supplemental briefs from both parties.

23 All right. Is there anything -- so I'm going to defer ruling
24 on Docket No. 30.

25 Is there anything else, Ms. McFarland?

1 MS. MCFARLAND: No.

2 THE COURT: Anything else, Mr. Higgins?

3 MR. HIGGINS: No. Thank you, Your Honor.

4 THE COURT: Okay. We will be in recess.

5 MS. MCFARLAND: Thank you.

6 THE CLERK: Court is in recess. Thank you, everyone.

7 (Adjourned.)

8

9

10 C E R T I F I C A T E

11

12 I, Nickoline M. Drury, RMR, CRR, Court Reporter for the
13 United States District Court in the Western District of
14 Washington at Seattle, do certify that the foregoing is a correct
15 transcript, to the best of my ability, from the record of
16 proceedings in the above-entitled matter.

17

18

19 /s/ Nickoline Drury

20 Nickoline Drury

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